



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

April 4, 2012

Mr. Scott D. Malott
One Park Row
Michigan City, Indiana 46360

Re: Formal Complaint 12-FC-67; Alleged Violation of the Access to Public Records Act by the Indiana State Police Department

Dear Mr. Malott:

This advisory opinion is in response to your formal complaint alleging the Indiana State Police Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Lt. Mark Carnell, Legal Counsel, responded on behalf of the Department. His response is enclosed for your reference.

BACKGROUND

With your formal complaint you provided a series of records that consist of the following:

- A February 29, 2012 denial issued by the Department
- A Request for Access to Public Record, dated February 2, 2012, which was submitted to the Department. In the narrative section, you provide "See Attached Sheet" in reference to the records that were sought.
- Correspondence directed to a Mr. Owens, to which I assume was written by you, as the correspondence is not signed. The letter detailed that an order compelling discovery filed in the Montgomery Circuit Court ("Court") had been issued by Judge Milligan in Cause No. 54-C01-0903-MR-32.
- Your Affidavit of Indigency
- A Request for Access to Public Record, dated February 2, 2012, which was submitted to the Department. The request sought "Any and all notes, reports, Supplemental reports, photos, APBs messages sent or received by the Indiana State Police by the Montgomery County Sheriff's Department and Madison County Sheriff's Department on March 9, 2009 in reference to the shooting death of Heather Rush at 3749 West 1200 North Romney, Indiana 47891.
- A second copy of your Affidavit of Indigency

You provide that you requested access to certain records from the Department on February 29, 2012 and were denied on March 2, 2012. You have included no further details regarding your request and/or denial other than what has been provided.

In response to your formal complaint, Lt. Carnell provided that on or about February 2, 2012, you mailed two requests for records to the Department's Records Division. Both requests were printed on or attached to a "Request for Access to Public Record Form" provided by the Indiana Department of Corrections.

The first request attached a letter that alleged the Court had issued an "order compelling discovery" for certain laboratory test results. You did not provide any further documentation, including but not limited to, the actual order issued by the Court. Your second request sought "Any and all notes, reports, Supplemental reports, photos, APBs, messages sent or received by the Indiana State Police Department by the Montgomery Sheriff's Department on March 9, 2009 in reference to the shooting death of Heather Rush at 3749 West 1200 North Romney, Indiana 47891. Both requests were accompanied by Affidavits of Indigency.

The Department advised that it did not respond directly to your requests. Instead, on or about February 29, 2012, the Records Division sent you a standard "Criminal History Information Correction Slip." The form noted that you did not submit the correct form, include fingerprints, or pay the necessary fee. The Department admitted that it did not respond to your requests within seven (7) days of receipt, as required by section 9 of the APRA. Further, the response that was provided was inappropriate as it did not specifically address your request.

As to the substance of your first request, you did not provide the proper documentation from the Court regarding its "order compelling discovery." If it can be determined that your first request was submitted pursuant to the APRA for blood samples taken by the Department, then the Department would have discretion pursuant to I.C. § 5-14-3-4(b)(1) to deny your request. The Department longstanding and uniformly applied policy has been to withhold investigatory records when sought pursuant to an APRA request. As to your second request, again the Department would provide that it can properly deny your request pursuant to I.C. § 5-14-3-4(b)(1), as you sought investigatory records of a law enforcement agency.

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." *See* I.C. § 5-14-3-1. The Department is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Department's public records during regular business hours unless the records are

excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

As to your first request, the APRA provides the right to inspect and copy records of a public agency. However, it is separate and distinct from other court proceedings, both civil and criminal. Your first request provided that the Department is required to comply with the Court's Order compelling discovery of certain laboratory results. Although you submitted the request on a "Request for Public Access Form", it is evident you are attempting to have the Department comply with the Court's Order issued pursuant to a criminal proceeding. As such, your request was made through means outside the scope of the APRA. *See Opinions of the Public Access Counselor 07-FC-314 and 08-FC-324*. If you believe that the Department has failed to comply with the Court's Order, you would need to file an appropriate motion with the Court to address the alleged failure.

As to your second request, a request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here the Department has admitted that it failed to respond to your second request within seven (7) days of its receipt and when it did respond, it did not provide the specific exemption allowing the withholding of such records. As such, it is my opinion that the Department acted contrary to section 9 of the APRA in responding to your second request.

As to the substance of your denial, the investigatory records exception to the APRA provides that a law enforcement agency has the discretion to disclose its investigatory records. An investigatory record is "information compiled in the course of the investigation of a crime." *See* I.C. § 5-14-3-2(h). The investigatory records exception does not apply only to records of ongoing or current investigations; rather, it applies regardless of whether a crime was charged or even committed. The exception applies to all records compiled during the course of the investigation, even after an investigation has been completed. The investigatory records exception affords law enforcement agencies broad discretion in withholding such records. *See Opinion of the Public Access Counselor 09-FC-157*. "Generally, a police report or incident report is an investigatory record and as such may be excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(1)." *Id.* The Department would have discretion to grant or deny your request for investigatory records pursuant to I.C. § 5-14-3-4(b)(1); thus it is my opinion that it did not violate the APRA in denying your second request.

Finally, I would note that the APRA permits a public agency to charge a fee for copies of public records. *See* I.C. § 5-14-3-8. Additionally, a public agency may require a person to pay the copying fee in advance. *See* IC 5-14-3-8(e). Nothing in the APRA requires that a public agency waive a copying fee. *See Opinion of the Public Access Counselor 07-FC-124.*

CONCLUSION

For the foregoing reasons, it is my opinion that the Department acted contrary to section 9 of the APRA in its response to your second request. As to all other issues, it is my opinion that the Department did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive, somewhat stylized font.

Joseph B. Hoage
Public Access Counselor

cc: Lt. Mark Carnell